Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS

BellSouth Corporation, by counsel and on behalf of its affiliated companies (the "BellSouth Companies"),[1] replies to comments submitted in response to the Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees.[2]

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[1] BellSouth Corporation is a publicly traded Georgia corporation that holds the stock of companies which directly or indirectly offer local exchange, exchange access and toll telephone services, provide advertising and publishing services, market and maintain stand-alone and fully integrated communications systems, and provide mobile communications and other network services world-wide.

[2] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber*

I. INTRODUCTION

Section 253 of the Telecommunications Act of 1996 (the "Act"), relates to the "removal of barriers to entry" for the provision of any interstate or intrastate telecommunications service. Section (c) of Section 253 provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[3]

This section preserves whatever authority local governments had, *prior* to the Act, to exercise their legitimate police powers over the public rights-of-way and charge fair and reasonable compensation on a competitively neutral basis. The Act does not enhance the authority of local government to impose conditions upon the Company's use of the rights-of-way or to charge compensation. However, since passage of the Act, several local governments have read this Section as providing them new expanded authority to impose additional conditions, regulate use of their rights-of-way and raise new sources of revenue:

> The emergence of municipal actions to capture the economic rent from the public right-of-way – a scarce, unique public resource – has surprised and confounded both state officials and many experts in the telecommunications field. No one expected this municipal response during the deliberations on the federal Telecommunications Act of 1996. Aggressive efforts by the cities of Denver and Chattanooga stimulated spirited advocacy by the municipal leagues in several

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Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141 (released July 7, 1999) ("NOI"), Order, DA-99-1563 (August 6, 1999).

[3] 47 U.S.C. § 253(c).

> states. In response to a growing chorus of populist rhetoric, a large number of cities throughout the Southwest and Midwest adopted franchise fees (up to 5 percent on gross receipts) on telecommunications firms. Many of them have been stalled in the courts. The controversy has pushed the conflict into the state legislature.[4]

BellSouth is a member of the Florida Telecommunications Industry Association, Inc. ("FTIA") and participated in the preparation of the FTIA's separately filed comments in response to the NOI. BellSouth concurs in the analysis and conclusions of the FTIA comments. The limits of local authority to manage rights-of-way are clear in Florida pursuant to state statute, and are consistent with the recent trend of state legislatures to reassert their role in regulating the telecommunications industry and to limit municipal responsibility to its historical and important role of managing and maintaining the public right-of-way.[5] Nevertheless, some local governments, often at the behest of consultants, have enacted and continue to enact ordinances that clearly exceed these jurisdictions' legal authority. These ordinances materially affect the ability of BellSouth and other carriers to compete.

This activity is not confined to Florida, one of nine states in which BellSouth is authorized to provide local exchange and exchange access services. Within a majority of these states some local governments have attempted to enact ordinances in the guise of rights-of-way management regulation that, in truth, constitute overreaching attempts to generate local revenue or expand the local government's authority beyond its limited and proper role of exercising police power to manage rights-of-way. In BellSouth's experience, such local governments appear to believe that they have little to lose in enacting such ordinances and in defending them

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[4] Thomas W. Bonnett, The State Role in Regulating Telecommunications--Municipal Right-of-Way and Franchise Fees (The Council of State Governments, October, 1998) at 2.

[5] *Id.* at 3.

in protracted legal challenges, notwithstanding their likely inability to withstand judicial scrutiny. To carriers that cannot live with the regulations, but must live with the regulators, such litigation constitutes both an economic barrier to entry and an untenable way to order their relationships with local governments.

Attached to these comments as Appendix A is a representative, but not an exhaustive, list of provisions in such ordinances enacted or, in certain instances, proposed but not enacted, by local governments. Unless otherwise indicated, the local governments listed in the appendix are located in Florida.

II. DISCRIMINATORY TAXATION MATERIALLY AFFECTS BELLSOUTH'S ABILITY TO COMPETE

In Section III. D. of the NOI, the Commission has solicited comments on various aspects of state and local tax law and policy as they relate to competition in the provision of telecommunications services and on the sufficiency of the remedies available to correct inequities. There are several areas in which BellSouth companies have experienced discriminatory treatment that materially affects their ability to compete.

A. Discriminatory Property Taxes

The property tax statutes and practices in many states result in the imposition of a significantly higher tax burden on companies treated as "public utilities," which generally includes incumbent local exchange carriers. The excessive burden on such companies is the result of two aspects of these tax systems.

Ad valorem property taxes generally are imposed on the "assessed value" of a taxpayer's property, which is typically set by state statute at some fraction of the property's "fair market value" or "true value," depending on the type of property (e.g., real or personal) and/or the use of

the property (e.g., residential or commercial). The first aspect of discriminatory treatment results from the fact that, in some states, the statutory assessment ratio for public utility property is greater than—sometimes as much as double—the assessment ratio for property owned by other commercial and industrial taxpayers not classified as public utilities.[6]

Second, regardless of whether state law mandates a higher assessment ratio for public utility property, most states employ different methods of valuation for public utility property. Most non-utility property is assessed locally by county tax assessors, and the valuation of such property is based primarily on comparable sales (for real property) and cost (for personal property). Public utility property, on the other hand, is typically assessed centrally by a state agency, and its value is determined primarily by capitalizing the company's income and, to some extent, by estimating the value of the company based on prices reflected in recent mergers and acquisitions of the same or other companies. In addition, as pointed out by Western PCS and CTIA in their petitions,[7] some states calculate the value of property owned by cellular and PCS providers by including the amounts paid at auction for their licenses. In today's environment, these methodologies virtually always produce a value figure that is higher than what would be obtained using the same methods used by local assessors for valuing non-utility property.

The treatment of telecommunications companies as public utilities clearly results in such companies bearing a greater tax burden than most other types of businesses. In addition, many telecommunications companies, particularly smaller companies and new entrants, are not treated

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6 There are four such states in the BellSouth region: Alabama, Louisiana, Mississippi, and Tennessee.

7 *See* "Commission Seeks Comment on Petition for Preemption and Motion for Declaratory Ruling filed by Western PCS I Corporation," *Public Notice*, DA 96-1211, released July 30, 1996. *See also* Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments, Petition for Rule Making

as public utilities for property tax purposes, either because they do not fall within the statutory definition of "public utility" or because state tax administrators do not aggressively enforce the statutes and assess these companies as public utilities. Thus, telecommunications companies classified as public utilities have relatively higher costs, which must be recovered through higher prices, and are therefore at a distinct competitive disadvantage compared to companies providing similar services but not classified as public utilities. This disadvantage falls particularly heavily on incumbent local exchange carriers, since such companies own substantial amounts of property and they historically have been treated as public utilities for property tax purposes.

B. Discrimination in Transaction Taxes

Certain state and local utility transaction taxes, such as utility excise, gross receipts, and business license taxes, discriminate against the telecommunications industry and against certain segments of the industry in much the same way as the property taxes discussed above. For example, in Florida, a gross receipts tax applies to the sale of most "utility" services, including telecommunications. In addition, in many local jurisdictions in Florida, a utility excise tax similarly applies to most utility services, including telecommunications. In addition to discriminating against businesses classified under these laws as "utilities," these taxes do not apply uniformly to all telecommunications services and are not enforced uniformly with respect to all telecommunications companies. Incumbent local exchange carriers and other established carriers are in the worst position, because these taxes historically have applied to their services and have been enforced against them.

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of the Cellular Telecommunications Industry Association, filed on September 26, 1996.

C. Discrimination Against Wireless Carriers

Since passage of the 1996 Telecommunications Act, numerous cities across the nation, and in some instances counties, have adopted or amended ordinances imposing substantial tolls or rents, sometimes called franchise fees, as "compensation" for use of the public rights-of-way by telecommunications companies.[8] Since wireless carriers generally do not use the public rights-of-way for placing their facilities, they cannot be required to pay these fees. Some jurisdictions have instead imposed business license taxes at rates far exceeding those paid by other businesses, in an attempt to circumvent their inability to exact fees from these companies under the guise of compensation for use of the public rights-of-way. For example, over 150 municipalities in South Carolina, at the urging of the Municipal Association of South Carolina, passed such an ordinance. Similarly, at least two jurisdictions in Kentucky have amended their business license tax ordinances to impose license taxes of approximately $4,000 based on the ownership of cellular towers within the respective jurisdictions.

Wireless carriers that do not use the public rights-of-way should not be required to pay compensation for such use, either directly or in the form of discriminatory business license taxes. The imposition of such discriminatory taxes clearly impedes the ability of wireless carriers to compete with other segments of the telecommunications industry.

D. Remedies Available to Correct Inequities

The traditional means of remedying discriminatory treatment is through litigation challenging the treatment under the equal protection clauses of the state and federal constitutions.

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[8] It is BellSouth's position that, to the extent the amount raised by such a fee exceeds the local government's actual cost of managing the rights-of-way, the fee is in reality a tax, regardless of the name ascribed to it and notwithstanding the fact that compensation in excess of such costs may be permitted under state law in some cases.

It is extremely difficult, however, for a taxpayer to successfully challenge a tax scheme on equal protection grounds. State and local governments are afforded a great deal of deference in the tax area and, in order to prevail, the taxpayer must establish that there was no possible rational basis for the law in question. Stated another way, a tax law will not be held to violate equal protection simply because it does not foster competition—or even if it happens to retard competition—as long as there is some conceivable rational basis upon which the law could have been based.[9]

Since much of the discrimination against the telecommunications industry or against certain segments of the industry is inherent in or results from the provisions of existing state and local law, to the extent that such laws are not unconstitutional, the only remedy is to change the law. This process is, at best, a difficult and tedious one that faces stiff opposition from a variety of competing interests. Moreover, in some cases, particularly the discriminatory assessment ratios in the property tax area, the discriminatory treatment is rooted in the state constitution, making change even more difficult, if not impossible.

Theoretically, discrimination against certain segments of the telecommunications industry would be eliminated if the tax laws treated all telecommunications providers equally and if such laws were actually enforced with respect to all telecommunications providers. However, in order to assure such equality of treatment and to promote growth and competition in the telecommunications industry, the tax laws should treat telecommunications providers the same as all other commercial taxpayers.

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[9] Conceivably, some of these laws and practices could be challenged under the 1996 Telecommunications Act. As the Commission correctly points out in the Notice of Inquiry, however, its authority to preempt state and local tax policies is extremely limited, and the Act itself states that it generally is not intended to preempt state and local tax laws.

CONCLUSION

Local municipalities have exceeded their lawful authority to regulate the public rights-of-way by enacting discriminatory revenue-raising and overreaching ordinances that adversely affect telecommunications competition.

Respectfully submitted,

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Appendix A

EXAMPLES OF UNLAWFUL PROVISIONS IN ORDINANCES PROPOSED OR ENACTED BY LOCAL GOVERNMENTS[1]

I. Ordinances Intended to Raise Revenue

The following provisions, contrary to applicable law, impose costs on telecommunications companies that exceed the administrative costs as incurred by the local government in regulating the public rights-of-way (ROW).

A. Application Fees

1. Altamonte Springs – $5,000 application fee; $3,000 renewal fee
2. Boca Raton – $2,500 application fee to transfer a use agreement to an affiliate; $5,000 for any other application; supplemental charges for external cost incurred in reviewing the application.
3. Broward County – franchisee must pay county's out of pocket expenses if the cost in reviewing the application exceeds the filing fee. The reimbursement cannot exceed $10,000.
4. Lake Park/Weston/Aventura/Miramar/Tamarac/Homestead – $10,000 application fees
5. Jefferson Parish, Louisiana[2] – $100,000 acceptance fee
6. Morgan City, LA – $2,500 application fee
7. Bartlett, Tennessee – $5,000 "bid" fee
8. Shreveport, LA – 2% of construction cost; future "reasonable costs and expenses" related to third parties, such as attorneys and consultants regarding renewal or modification of agreement

B. Revenue Provisions Unrelated to ROW Costs

The following provisions, contrary to applicable law, attempt to derive local revenues from a carriers' indirect costs of doing business.

1. North Lauderdale/Wilton Manors/Palm Beach – gross revenue includes revenues derived by the operator or reseller directly or indirectly.

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[1] These examples are illustrative of provisions BellSouth has encountered in the states in which it is authorized to provide local exchange and exchange access service. In several cases, BellSouth has been successful in challenging the proposed fees through negotiations or litigation. The fee amounts set forth above do not reflect any modifications obtained through such negotiation or litigation. The foregoing examples are not exhaustive.

[2] A parish resembles a county rather than a municipal style of government.

2. Lake Park/Weston/Aventura/Miramar/Tamarac – charges gross receipts of recurring local services revenues from basic and non-basic services; requires franchisee to pay a greater amount to city if the franchisee is paying at higher rate in another Florida jurisdiction.
3. Broward County – franchise fee includes all revenue derived directly or indirectly by the operator (including from the reseller) and by an affiliate, subsidiary, parent company or any entity with whom the operator has financial interest.
4. Altamonte Springs – requires operator to pay the difference between what a reseller pays and what the operator would pay.
5. South Miami – requires franchisees to reimburse the city for revenue lost through metered parking spaces within the ROW
6. Boca Raton – permit fees include degradation costs; construction permit fees triple during probationary period.
7. Morgan City, LA – 5% gross receipts; includes direct and indirect costs in definition of "gross revenues."
8. Germantown, TN – includes sale of products in "gross revenue"
9. Mobile, Alabama – defines "city costs" as including indirect costs; permit fee includes "the cost of Obstructing the Right-of-Way, including lost parking meter revenue, costs associated with traffic management that results from street Obstruction, lost tax revenues resulting from streets blocked."
10. Durham, North Carolina – gives city the right to collect additional compensation in the form of fees, in-kind compensation, or combination of both.
11. Greensboro, NC – gross annual revenues include direct or indirect revenue of provider, its affiliates/subsidiaries, or "any person in which the grantee has a financial interest."
12. Shreveport, LA – gross revenues include indirect revenue

C. Franchise/License Fees

1. Coral Springs/North Lauderdale/Wilton Manors– 10% gross revenue fee
2. Altamonte Springs - $10,000 minimum fee per linear mile of cable, fiber optic, or any other pathway if grantee generates recurring local revenues less than $1 million.
3. Broward County –annual license fee equal to the greater of total per linear foot of cable, fiber optic, or other pathway or 1% gross receipts of recurring local service revenues.
4. Bartlett, TN – 5% franchise fee
5. Lexington; Jackson; Bolivar, TN – 5% "rental" fee
6. Jefferson Parish, LA – 5% gross receipts
7. Shreveport, LA – 5% franchise fee no less than $50,000
8. Orangeburg, South Carolina – 5% franchise fee

II. Provisions Which Extend Beyond Local Governments' Legal Authority

Several local governments have enacted ordinances purporting to grant themselves the power to issue franchises to operate a telecommunications system even though states grant such franchises. Unless a state specifically delegates such franchise authority to its local governments, state and federal law allow local governments to exercise their police powers, including granting permits to install facilities, conditioned only on a provider's agreement to comply with a city's reasonable regulations of its rights-of-way and fees required by state law. Moreover, in many cases local government franchise ordinances purport to reserve power to the local government to revoke a carrier's franchise for its failure to comply with local ordinances.

A. Provisions Purporting to Grant Franchises to Operate a Telecommunications System

1. Altamonte Springs – grants city authority to grant a telecommunications franchise to operate
2. North Lauderdale/Wilton Manors/Palm Beach – defines franchise as an authorization granted by the city required to operate in its ROW
3. Lake Park/Weston/Aventura/Miramar/Tamarac – requires permission from city to operate within ROW
4. South Miami – requires permission from city, via license agreement, to operate in ROW
5. Germantown, TN – defines franchise as the right to operate in the ROW
6. Broward County – grants county authority to request and review additional information to determine if applicant is qualified to operate in ROW
7. Greensboro, NC – franchise grant includes right to operate; requires providers already occupying ROW before June 1995 effective date to obtain a franchise; city has right to reject a franchise application
8. Germantown; Murfreesboro, TN – franchise application includes description of services, description of transmission medium, engineering plans, underground installation plans, construction schedule, financial statements, provider's technical qualifications, map of existing locations, proof of other governmental approvals, and description of access and line extension policies

B. Provisions Purporting to Regulate Telecommunications Company Operations

1. Altamonte Springs – polices "proper use" of the ROW
2. Boca Raton – allows municipality to prohibit or limit the placement of new or additional equipment

3. Coral Springs/North Lauderdale/Wilton Manor/Palm Beach – provides that "operation and repair" of facilities are subject to regulation of the city
4. Jefferson Parish, LA – requires provider to comply with National Electronic Safety Code and other safety regulations not governed by city
5. Morgan City, LA –requires provider to provide city with necessary equipment to test provider's services and distribution lines to insure they are operating according to "all applicable standards"
6. Bartlett; Murfreesboro, TN – require provider to comply with various state and federal construction and technical standards and provide the city with a written report of the provider's annual Proof of Performance tests
7. Bartlett, TN –timelines for service and repair requests; establishes requirements regarding provider's customer service and billing systems; requires mandatory continuity of service; requires certain services and facilities including broadband telecommunications
8. Mobile, AL – provides extensive construction standards with which provider must comply
9. Greensboro, NC – City has the right to inspect provider's telecommunications system; city approval required for every change, transfer, or acquisition of control of the provider and if approval not granted franchise subject to cancellation
10. Shreveport, LA – city has the right to oversee, regulate, and inspect construction, operation, and maintenance of all systems
11. Altamonte Springs – requires city consent to transfer or lease franchise, Outlines assignee requirements, requires notice to the city of proposed change or transfer. City can give grantee notice of violation if the grantee violates any federal, state, or local law or regulation
12. Durham, NC – gives city the right to prohibit provider from using facilities prior to, on, or after the date of the license
13. Germantown, TN – purpose of registration is to "assist City in monitoring compliance with local, State, and Federal laws"
14. Orangeburg, SC – city approval required in order to transfer "franchise"

C. Provisions Requiring Production of Proprietary Information and/or Documents Unnecessary to Regulate ROW

1. Lake Park – requires production of all financial statements, maps of all facilities, list of officers/directors, annual reports, "any and all pleadings, petitions, applications, communications, reports and documents...submitted by or on behalf of the Franchisee to the FCC, SEC, FPSC or any other State or Federal agency, court or regulatory commission which filings my impact the Franchisee's operation of the Franchisee's telecommunications system"
2. Altamonte Springs – requires production of all filings made with and communications received from the state PSC

3. Boca Raton – requires the maintenance of "accurate books of account and records of the business, ownership, and operations of the provider...with respect to the system in a manner that allows the City to determine whether the provider or...operator is in compliance...." Also requires registrant to bear the cost of compliance of city's study of books.
4. North Lauderdale/Wilton Manors/Palm Beach – Right to access any and all of provider's business records
5. South Miami – requires production of detailed documents regarding the corporate organization of the operator, including information on all officers, persons owning 5% or more of stock, affiliate and subsidiary information, financial statements, and "detailed description of the previous experience of the applicant in providing telecommunications company services or related or similar services"
6. Jefferson Parish, LA – requires production of detailed plans and schedules prior to construction; annual reports including financial report and status of construction plans; communications with and from regulatory agencies (PSC, FCC) "in respect to any matter affecting the operation of the Telecommunications Systems authorized pursuant to the Franchise"
7. Durham, NC – requires quarterly reports of persons buying, leasing, or reselling providers facilities
8. Lexington, TN – requires production of documents submitted to the FCC and TN Regulatory Authority relating to matters affecting the use of the right of way and the provider's services; requires provider to furnish complete information/records regarding construction, reconstruction, removal, maintenance, operation, and repair of facilities

III. Other Provisions Unrelated to Regulation of ROW

A. Exoneration from Liability

1. Altamonte Springs – exempts city from liability for any damages to the provider's property caused by city employees or interruption of the company's services due to city employees; provides for full indemnification of the City at grantee's sole expense
2. Broward County – full release from liability
3. South Miami – full release at provider's sole cost
4. Morgan City, LA – full release from interruption of provider's service or property damage caused by city employees
5. St. Tammany Parish, LA – full release from damage to facilities
6. Bartlett, TN – full release
7. Mobile, AL – city does not accept liability and applicant indemnifies city for its own negligence

8. Durham, NC – city liable only if damage was caused by its gross negligence
9. Shreveport, LA – city released from liability unless damages caused by city's willful misconduct or gross negligence

B. Purchase Clause

1. Lake Park/Weston/Aventura/Miramar/Tamarac/Homestead – allows city to purchase telecommunications system after it revokes or terminates franchise to operate at a valuation city determines to be fair market value
2. South Miami – allows city to purchase the telecom system after 180 days of revocation/termination of license to operate
3. Jefferson Parish, LA – grants city right to purchase property upon termination at a value according to net book value of initial cost less depreciation and salvage

C. In-kind Compensation

1. Morgan City, LA – requires provider to furnish, free of charge, one service distribution connection, including a modem, to each public school, library, hospital, police and fire station, church, and any other public building. If provider provides internet service, it must establish an internet address/home page for the city and provide necessary computer equipment to set up the home page; requires provider to extend joint use of poles to city free of charge.
2. Shreveport, LA – provider required to make available to the city 5% of bandwidth of its fiber optic and wire facilities and provide city access to its infrastructure
3. Durham, NC – requires provider to provide to city, at no charge, fiber and fiber cable and to install a "City Fiber Ring"

CERTIFICATE OF SERVICE

I do hereby certify that I have this 12th day of October, 1999, served the following parties to this action with a copy of the foregoing ***BELLSOUTH TELECOMMUNICATIONS, INC. AND BELLSOUTH CORPORATION COMMENTS***, reference WT Docket No. 99-217, and CC Docket No. 96-98, by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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